IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL REVISION APPLICATION NO. 259 OF 2007

1. Messrs.A.Shenoy & Co.,

2. P.V.Shenoy,

3. R.V.Gudal. ... Applicants.

V/s.

1. Shri N.D.Kadam
   Asst.Commissioner of
   Income Tax, Circle 21(2),

2. Commissioner of Income Tax,
   City IX, Mumbai,

3. Union of India. ... Respondents.

Arun P. Sathe, senior counsel with Mandar M.Vaidya for the applicants.

A.D.Kango for the respondents.

CORAM: V.C.DAGA, J.

DATED: 9th August 2007.

JUDGMENT :

. Heard learned counsel for the applicants and learned A.P.P. for the State.

2. The applicants have invoked revisional jurisdiction of this Court under section 482 of Code of Criminal Procedure, 1973 (Cr.P.C.) to challenge the

order dated 5th May, 2007 passed by the learned Additional Chief Metrorpolitan Magistrate (47th Court), Esplanade, Mumbai rejecting the prayer for discharge of the accused in Case Nos.5474/1990 to 5836/1990.

Factual Matrix :

3. Applicant No.1 was a partnership firm carrying on business as Civil Contractors, whereas applicant No.2 (since deceased) and applicant No.3 were the partners thereof. The applicants have contended that during the previous years relevant to the assessment years 1984-85 and 1985-86, applicant No.1 made interest payments to various parties who were its creditors. Such interest payments to some of the parties were more than Rs.1,000/- in aggregate, in a single previous year. The applicant No.1 failed to deduct tax at source (TDS) while making such payments which exceeded Rs.1,000/- in aggregate.

4. The respondent No.1 launched prosecution against the applicants, on 28th February, 1990, before the Addl.Chief Metropolitan Magistrate alleging that the failure to deduct tax at source amounts to an offence under section 276B of the Income Tax Act, 1961, as it stood prior to 1st April, 1989. The applicant Nos.2 and 3 and applicant No.1 were also proceeded against since they were in-charge of and

responsible for the affairs of the firm. The copy of complaint filed by the Revenue along with copy of sanction for prosecution issued by the Commissioner is filed on record at Exh.A.

5. The learned Addl. Chief Metropolitan Magistrate issued process against the applicants and summoned them. The copies of the orders directing issuance of process are also filed at Exh.B.

6. The applicants filed discharge application on 5th February, 1991 contending, *inter alia*; that in view of the change in the Law with effect from 1st April, 1989, the prosecution was not maintainable. According to the applicants, under the amended provisions, failure to deduct tax at source was no longer an offence. The Revenue filed reply to the said application on 28th October, 2005. In its reply, the Revenue contended that the prosecution was maintainable since, section 276B of the Income Tax Act was not omitted at the time of launching prosecution as such failure to deduct tax was an offence when the interest payments were effected. It was also the contention of the Revenue that such a prosecution was saved by section 6 of the General Clauses Act.

7. The said discharge application was finally heard on 27th April, 2007 and rejected by the impugned order dated 5th May, 2007.

Submissions :

8. Mr.Sathe, learned senior counsel for the applicants submits that the amendment to section 276B of the Income Tax Act with effect from 1st April, 1989 amounted to ‘omission’ and not ‘repeal’. He submits that section 6 of the General Clauses Act is applicable to repeal and not to omission.

9. Mr.Sathe pointed out that the present prosecution was launched on 28th February, 1990 when failure to deduct tax was no longer an offence, in other words, it was not an offence at the time when the prosecution was launched. He submits that since the change in section 276B of the Income Tax Act amounts to an omission, all actions under the omitted part should stop at the point when the omission takes place. Mr.Sathe relied upon the judgments of the Apex Court and also other High Courts referred to hereinafter. Hence, in his submission, the present prosecution is not maintainable.

10. Per contra, Mr.Kango tried to support the order placing reliance on some of the reported judgments, viz., AIR 1993 SC 1188 (**M/s.P.V.Mohammad Barmay Sons v. Director of Enforcement**); 196 ITR 638 (**Income-Tax Officer v. Anil Kumar**); 197 ITR 545 (**C.A.Baloo & Anr. v. Union of India**); and 197 ITR 553 (**Sakthi & Co. v. Income-Tax Officer**).

Statutory Provisions :
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11. Before considering the rival submissions, it is necessary to turn to the statutory provisions. The following are the relevant extracts of section 276B of the Income Tax Act prior to 1st April, 1989 and after 1st April, 1989.

> **Section 276B** (as on 01/10/1975 and upto 10/9/1986)
>
> If a person, without reasonable cause or excuse, fails to deduct or after deducting, fails to pay the tax as required by or under the provisions of sub-section (9) of section 80E or Chapter XVII-B, he shall be punishable.-
>
> (i) In a case where the amount of tax which he has failed to deduct or pay exceeds one hundred thousands rupees, with rigorous imprisonment for a term which shall not be less than six months but

which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Section 276B (from 10/9/1986 but prior to 1.4.1989)

Failure to deduct or pay tax

If a person, fails to deduct or after deducting, fails to pay the tax as required by or under the provisions of sub-section (9) of section 80E or Chapter XVII-B, he shall be punishable,-

(i) in a case where the amount of tax which he has failed to deduct or pay exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Section 276B (after 1st April 1989)

Failure to pay the tax deducted at source.

If a person fails to pay to the credit of the Central Government, the tax deducted at source by him as required by or under the provisions of he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.

Consideration :

12. Having heard rival parties, having seen the statutory provisions, the said provisions clearly state that with effect from 1st April, 1989, failure to deduct tax is no longer an offence. In fact, penalty provision under section 271C has been inserted with effect from April, 1989 for failure to deduct tax. Now, let me first turn to the legal position before turning to the submission of Mr.Kango, learned counsel for the respondents with regard to the applicability of section 6 of the General Clauses Act to the facts of this case.

13. In **Kolhapur Canesugar Works Ltd. v. Union of India**, AIR 2000 SC 811, the Apex Court held that there is difference between an 'omission' and 'repeal'. Section 6 of the General Clauses Act applied only to repeal and not to omission. Whenever any provision/ rule is omitted, all actions under the omitted rule/ provision must stop where the omission finds them.

14. **General Finance Co. v. Asst. C.I.T.,** (2002) 257 ITR 338 (SC), it was held by the Apex Court that section 276DD was omitted with effect from 1st April, 1989 and hence complaints which were filed prior to

the omission could not be proceeded with since section 6 of the General Clauses Act applied only to repeal and not to omission.

15. In **Salwan Constructions Co. v. Union of India,** (2000) 245 ITR 175 (Del), it was observed by the Delhi High Court that "Repeal" connotes the abrogation of one Act by another, whereas "amendment" of a statute means an alteration in law leaving some part of the original still standing. Section 276B has been amended so as not to treat failure to deduct as a serious offence. Also there is no savings clause to initiate proceedings under the old section, after it has been amended/omitted. Hence complaints filed after the amendment to section 276B are not maintainable.

16. **Kaushal Kishore Biyani v. Union of India,** (2002) 256 ITR 679 (MP), it was observed by Madhya Pradesh High Court that since there is no savings clause in section 276B, complaints filed after 1st April, 1989 are not maintainable. Also the penal provisions cannot be given retrospective effect.

17. In **Narendra Kumar Khandelwal v. Union of India,** (2003) 259 ITR 593 (MP), it was held by the Madhya Pradesh High Court that though the complaints under section 276B were filed in March 1987 when failure to deduct was an offence, still the judgment of the trial court was delivered in April, 1996 when failure to deduct was not an offence. Hence the complaints were quashed since omission results in bringing halt to all actions under the omitted provision of the Act.

18. The various cases cited by Mr.Kango deal with the cases of 'repeal' and not that of 'omission'. Section 6 of the General Clauses Act applies only to repeal and not to omission. The change in section 276B of the Act with effect from 1st April, 1989 amounts to 'omission' and hence section 6 of the General Clauses Act cannot save the present prosecution. The present prosecution, admittedly, was launched on 28th February, 1990 when failure to deduct tax was no longer an offence. None of the judgments cited by Mr.Kango deals with issue involved in the case on hand.

19. Since the change in section 276B amounts to an

‘omission’, all actions under the omitted part should stop at the point where the omission finds them and hence the present prosecution is not maintainable.

20. In the circumstances, the impugned order dated 5th May, 2007 passed by the learned Magistrate on the discharge application taken out in Case Nos.5474/1990 to 5836/1990 is liable to be quashed and set aside.

21. In the result, revision application is allowed. Rule is made absolute in terms of prayer clause (a) with no order as to costs.

JUDGE